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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BARRY TRUPIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition:
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Questions Presented

1. Whether 18 U.S.C. § 2315 is unconstitutional under the principles of *United States v. Lopez*, 514 U.S. 549 (1995), in that the statute exceeds Congress' authority under the Commerce Clause?

2. Whether § 2315 as applied here is an unconstitutional *ex post facto* law that implicates petitioner's Fifth Amendment right to be free from compulsory self-incrimination?

3. Whether two key errors in the Trial Court's jury charge require reversal of petitioner's conviction?

List of Parties

Petitioner was indicted and tried individually.

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No.: _____

In The

Supreme Court Of The United States

October Term, 1997

BARRY TRUPIN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Barry Trupin respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction for a single violation of 18 U.S.C. § 2315, involving his possession of a stolen painting by Marc Chagall.[1]

[1] Rejecting the government's cross-appeal, the Second Circuit also upheld petitioner's sentence of five months imprisonment and five months house arrest.

Opinion Below

The Court of Appeals's opinion, *United States v. Trupin*, 117 F.3d 678 (2d Cir. 1997), appears at 1a.[2]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit denied Trupin's petition for rehearing on August 28, 1997. (43a-44a) This petition timely follows.

Constitutional and Statutory Provisions

The constitutional and statutory provisions involved in this petition appear at 45a-48a. They are as follows:

18 U.S.C. § 2315

FED. R. CRIM. P. 29(c)

FED. R. CRIM. P. 33

U.S. CONST. AMEND. V

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[1](...continued)
imprisonment and five months house arrest.

[2] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" refer to pages of the Joint Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript not included in the Joint Appendix.

U.S. CONST. ART. I, § 8, Cl.3

U.S. CONST. ART. I, § 9, Cl. 4

Jurisdiction in the District Court

The United States District Court for the Southern District of New York (Leisure, D.J.) had jurisdiction under 18 U.S.C. § 2315.

Statement of the Case

As the Trial Court noted, the prosecution of Barry Trupin rested upon a "totally unbelievable" (A: 1410) linchpin witness, and was "not a strong case for the government." (T: 829)

In April of 1969, a minor Marc Chagall painting, "Le Petit Concert," was purchased by a family residing in Baltimore, Maryland. (T: 40-42, 86-88, 148) In or about April 1970, that painting, along with approximately 22 others, was stolen from the Baltimore family's apartment. (T: 96-97) As the Second Circuit acknowledged, **"[t]here is no suggestion that Trupin played any role in this theft."** (3a) (emphasis supplied) Nonetheless, in 1979, almost 10 years later, the Chagall painting resurfaced when it was bought by a company owned by Trupin from one Raul Zuniga – the government's star witness.[3]

---

[3] The Second Circuit adopted the Trial Court's dim view of Zuniga, stating:

> The trial judge found Zuniga to be utterly incredible – a down-and-out artist put on retainer and given a car, who repaid Trupin with a stolen painting. Zuniga, it was shown, also had

(continued...)

Zuniga charged Trupin $100,000 for the painting. (T: 285) According to the **government's** expert witness, and as the District Court found at sentencing, **this was the painting's full market value at the time of the sale.**[4] (T: 493-94) Indeed, in its opening statement and summation, the government expressly conceded that Trupin paid full value for the painting. In addition, the government's expert testified that many comparable paintings by Chagall were readily available when Trupin bought "Le Petit Concert."

By the time of the sale, Zuniga was no stranger to Trupin. Trupin had met Zuniga, an artist of some repute, in or about 1977, through his former spouse, Judy Trupin. (T: 173-79) Thereafter, Trupin commissioned a number of sculptures from Zuniga, and hired him to (a) decorate a large company yacht, and

---

[3](...continued)

> difficulties not only with another art purchaser but with the FBI regarding a stolen Picasso. Furthermore, numerous contradictions permeated his testimony, including the fact that he specifically denied in sworn testimony in 1989 having seen the Chagall hanging in the Trupin company yacht, though subsequently admitted having sold the Chagall to Trupin. **Were there no evidence other than Zuniga's testimony, the trial judge surely would not have let Trupin's conviction stand.**

(4a-5a) (emphasis supplied)

[4] Why Trupin would pay full value for a rather common painting if he believed that it was stolen has never been explained by the government.

(b) advise Trupin with respect to the acquisition of artwork. (T: 186-91, 196-205, 212)

When he retained Zuniga, Trupin was a very successful businessman earning millions of dollars from the structuring and selling of tax leveraged investments. (T: 576, 597, 926) Trupin made extraordinarily free use of his wealth, acquiring valuable real estate, a yacht, art work and other exotica, including a suit of armor worn by Henry II and antique Judaica. (T: 115-16, 122, 423-24, 562, 582, 592, 597)

Zuniga was also a beneficiary of Trupin's bounty, receiving a new Mercedes convertible as a gift from Trupin, selling several sculptures to him, and earning a healthy wage for decorating the yacht. (T: 191-213, 254-55, 319-26, 331) As the Second Circuit aptly observed, "at that point in Trupin's life, money was no object, and he simply did not refuse to purchase an item he wanted because of its cost. Thus, in context, the obtaining of the Chagall for $100,000 was a fairly minor transaction for Trupin." (4a) And while there is no doubt that **Zuniga** knew the painting was stolen, there is grave doubt that **Trupin** had such knowledge.

To this end, Zuniga testified that he had obtained the Chagall from a person known to him only as "Jack," later identified as one Angelo Jack Inglese. (T: 214-32, 270) Zuniga further testified that Jack told him that he (Jack) had several stolen paintings for sale. (T: 232) Zuniga first attempted to sell seven of these paintings, all by lesser artists, to Trupin, who refused the offer. (T: 245, 250-52) Zuniga then told Trupin that the Chagall painting at issue in this case was available, and Trupin purchased it. (T: 251, 285)

Despite the fact that the painting was acquired for its full market value, and that there was no evidence that any of the

other items Trupin paid tens of millions of dollars to buy were stolen, Zuniga claimed that, both when he sold the painting and on at least one other occasion, he explicitly told Trupin that the painting was stolen. (T: 238-39)

In response to this testimony, the defense argued that Zuniga was entirely unworthy of belief. Remarkably, the Trial Court agreed with this assessment:

> We had in this case a witness who dragged Mr. Trupin down. And that was Mr. Zuniga, whose testimony I listened to during trial. And unless there was corroboration on his testimony, **I found him totally unbelievable....**
>
> All you have to do is review the testimony at trial to see the kind of care Mr. Trupin took of Mr. Zuniga, a down-and-out artist, who was put on retainer, given a Mercedes car, and repaid him, one, with a stolen painting, and, two, sleeping with his wife.

(A: 1410) (emphasis supplied)

The Trial Court's impression of Zuniga was dead on point, as evidenced by his inability to keep his story straight with respect to the Chagall painting – a story that was intertwined with his efforts to sell a painting by Picasso, which was stolen from the same Baltimore residence as the Chagall painting, and at the same time.[5]

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[5] Zuniga testified that he also obtained the Picasso from "Jack." (T: 234, 239-40)

Given his shifting stories about the Chagall, Zuniga – who also admitted to drug use (T: 201, 371) and to an affair with Trupin's wife while Trupin was serving as his patron (T: 177) – was an extremely problematic witness for the government. And, as the **only** witness who testified to Trupin's knowledge that the Chagall had been stolen, he was the *sine qua non* of the government's case, thus leading to the Trial Court's conclusion that the case was "not a strong [one] for the government." (A: 829)

The balance of the evidence focused upon Trupin's conduct after he came into possession of the painting. Yet, that proof was not only entirely equivocal, but patently inconsistent with the claim that Trupin knew the painting was stolen.

Thus, after buying the Chagall, Trupin put it in the salon of his company's yacht, behind ornate doors carved by Zuniga. (T: 256) According to the government, this was an effort to hide a knowingly stolen painting. (T: 256) The evidence shows, however, that soon after purchasing the painting, Trupin threw a party on the yacht for as many as 60 people, flung the doors wide open, and proudly called his guests' attention to his new acquisition. (T: 256, 286-87, 585-87, 844-46, 924-26) Moreover, Trupin showed the Chagall to guests on his yacht many different times.

Subsequently, Trupin moved the painting to his home in Westport, Connecticut. In late 1979, Trupin's wife filed for divorce and took the Chagall, claiming that it was marital property. (T: 854-59) Significantly, Trupin demanded the painting's return. Had he known the painting was stolen, of course, Trupin would not have made an issue of it in the litigation. In any event, the painting was returned to Trupin in

March of 1980, the latest date as to which there was proof that the painting crossed a state line. (T: 858)[6]

In the mid-1980's, a change in the tax laws resulted in the demise of Trupin's business. (T: 596-97, 937) By 1990, his situation had become desperate. To pay his mounting debts, Trupin began selling his holdings at, as one witness characterized it, "fire sale" prices. (T: 917) Among the many items that Trupin attempted to sell was the Chagall painting. Trupin enlisted the aid of a person named Irving Ayash for this purpose. In February, 1990, Ayash told Trupin that he had a buyer who was willing to pay $350,000 for the painting. (T: 632) Although the painting was by then worth over $1 million,[7] Trupin, with his creditors at his heels, gave it to Ayash to sell. (T: 748)

The government claimed that this private sale was further evidence that Trupin knew the painting was stolen. However, there was evidence that Trupin had tried to sell other, legitimately acquired property – including the Henry II armor and an unfinished mansion – at prices far below market. (T: 680-81, 894-98, 917) Thus, the proof showed that Trupin was privately liquidating concededly legitimate holdings at whatever

---

[6] This last transportation over state lines is relevant to our argument in POINT I, *infra*. There, we contend that the statute of conviction – 18 U.S.C. § 2315 – is unconstitutional because it requires proof only that stolen property cross a state line, as opposed to a connection to interstate commerce. Hence, the transfer of the painting from Connecticut to New York is significant because it demonstrates that property can cross state lines without having any impact on interstate commerce.

[7] There was no proof that Trupin knew the painting had appreciated in value to such a great extent.

price could be had. Indeed, given that creditors were hounding him, the fruits of any public sale by Trupin, such as at an auction house, would have been lost.

After receiving the Chagall, Ayash disappeared with it for an unspecified period of weeks. Unbeknownst to Trupin, Ayash and someone named Joseph Mirisola had conspired to cheat Trupin by selling the painting for much more than $350,000 and pocketing the difference. (T: 681-85) However, Mirisola learned that the painting was stolen, and so informed the authorities, reaping a $100,000 reward in the process. (T: 652-68) As a result, Ayash was apprehended and, in turn, pointed the finger at Trupin as the seller of the painting. (*Id.*) Tellingly, though, Ayash was never charged with a crime himself, and was not called by the government to testify at trial.

In sum, then, this Court must conclude, as did the Trial Court and the Second Circuit, that the government's case was very thin. In this light, the light of possible innocence, there can be no credible claim of harmless error.

REASONS FOR GRANTING THE PETITION

I. DEFENDANT'S CONVICTION SHOULD BE REVERSED, AND THE INDICTMENT DISMISSED, BECAUSE 18 U.S.C. § 2315(a) EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE

Though characterizing our claims based upon *United States v. Lopez* as "sophisticated and creative," the Second Circuit majority upheld "amended § 2315" as falling within (a) "the first of the three *Lopez* categories, *i.e.*, it is a regulation of 'use of the channels of interstate commerce,'" and (b) "the third category enumerated in Lopez"; *i.e.*, Congress' power to regulate

activities that substantially affect interstate commerce. (8a) Respectfully, these conclusions do not withstand scrutiny.

Section 2315(a)[8] is violated when one

> receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise ... of the value of $5,000 or more ... which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken.

Prior to 1986, § 2315(a) criminalized the receipt, storage, etc. (but not possession) of stolen property only insofar as it was "moving as, or ... a part of, or ... constitute[d] interstate or foreign commerce...." Then, in 1986, Congress amended the statute by adding mere possession of stolen property as a means of violating § 2315(a), and replacing the interstate commerce requirement with the far less onerous standard of proving merely that the property had "crossed a State or United States boundary after being stolen...."[9]

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[8] Section 2315 has no lettered subsections. For ease of reference we have designated the first paragraph of the statute – the one at issue here – § 2315(a).

[9] This change in the statute is what permitted Trupin's prosecution. That is, there came a time, prior to 1986, when Trupin's dominion over the painting was no longer criminal because (a) it was no longer moving in or a part of interstate commerce, and (b) more than five years had passed since it had "'come to rest.'" *See, e.g., United States v. Tobin*, 576 F.2d 687, 692 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). Hence,

(continued...)

In light of *Lopez*, it is now clear that § 2315(a), as amended, exceeds Congress' authority under the Commerce Clause. In contrast even to the second and third paragraphs of the statute,[10] § 2315(a) does not require **any** connection to or impact upon interstate commerce. As such, it suffers from the same infirmity as the statute struck down in *Lopez*: the absence of a "jurisdictional element which would ensure, through case-by-case inquiry, that the [prohibited conduct] affects interstate commerce." 115 S. Ct. at 1631.

As we explain below, § 2315(a)'s requirement that property cross state lines after being stolen does not begin to ensure this required "case-by-case inquiry" because the mere fact that property crossed a state line does not translate into the property having entered interstate commerce. For example, if, in 1975, a father were to (a) buy a stolen painting in one state, (b) display the painting at his home in that state for five years, (c) move to another state with the painting, and then (d) give it to his daughter or son 20 years later, the child could be prosecuted under § 2315 so long as he or she knew that the painting had been stolen 25 years earlier. Yet, no one could rationally claim that the receipt of the painting, or even the father's transporting it across state lines 20 years earlier, had any

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[9](...continued)
Trupin could not have been prosecuted for his original 1979 receipt of the painting. Rather, the prosecution here was predicated upon Trupin's continued possession of the painting after the 1986 amendment of § 2315.

[10] Both of these subsections – concerning forged securities or tax stamps – continue to require proof that the security or tax stamp be "moving as, or ... a part of, or which constitute interstate or foreign commerce...."

impact on or nexus with interstate commerce. This being so, the statute, by its very terms, permits prosecution of crimes having no connection whatever to interstate commerce.

A. THE *LOPEZ* DECISION

In *Lopez*, this Court invalidated, on Commerce Clause grounds, 18 U.S.C. § 922(q)(2)(A) ("§ 922(q)"), which made it a crime for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The *Lopez* Court set forth the circumstances under which Congress acts within the scope of its authority:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power.... First, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce..., *i.e.*, those activities that substantially affect interstate commerce.

115 S. Ct. at 1629-30 (citations omitted).

Considering § 922(q) within this framework, the Court quickly concluded that the statute did not fall within the first two categories described above. *Id.* at 1630. This, then, left the third category of appropriate action: regulation of activities having a

"substantial relation" to interstate commerce. With respect to this category, the Court held that Congress may regulate only activity which "'substantially affects' interstate commerce," *id.* at 1629-30, and that § 922(q) did not meet this test. *Id.* at 1630-31, 1634 (citation and footnote omitted).

B. APPLICATION OF *LOPEZ* TO § 2315(a)

Contrary to the position of the Second Circuit majority, § 2315(a), like § 922(q), does not fit within either the first or the third categories of Congress' commerce power. **First**, as a statute that (a) criminalizes the mere possession, storing or even gifting of stolen property that crossed state lines at **any** time in the past, and (b) does not require that the property crossed state lines as a part of interstate commerce, it is clear that § 2315(a) cannot be viewed as an effort to regulate the channels of interstate commerce. *See Perez v. United States*, 402 U.S. 146, 150 (1971) (Noting that former § 2315(a), which required proof that the stolen goods were part of interstate commerce, did fall within this first category of Congress' commerce power). Indeed, Judge Lumbard, in his concurring and dissenting opinion, expressly so found:

> [Section] 2315's possession provision cannot ... be upheld as a first-category regulation of the channels of interstate commerce. The citations in *Lopez* demonstrating that "Congress may regulate the use of the channels of interstate commerce," 514 U.S. at 549, 115 S. Ct. at 1629, each deal with **the actual transportation of people or items in interstate commerce**. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S. Ct. 348, 357, 13 L. Ed.2d 258 (1964) ("The transportation of passengers in interstate commerce, it has long been settled, is

within the regulatory power of Congress, under the commerce clause of the Constitution") (quoting *Caminetti v. United States*, 242 U.S. 470, 491, 37 S. Ct. 192, 196-97, 61 L. Ed. 442 (1917)); *United States v. Darby*, 312 U.S. 100, 114, 61 S. Ct. 451, 457, 85 L. Ed. 609 (1941) ("Congress ... is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious"). "Thus, it seems clear that the first category of Commerce Clause authority outlined in *Lopez* concerns Congress's power to regulate, for economic or social purposes, passage in interstate commerce of either people or goods." *United States v. Rybar*, 103 F.3d 273, 288-89 (3d Cir.1996) (Alito, J., dissenting), *cert. denied*, 118 S. Ct. 46 (1997).

Possession, as opposed to transportation, does not use the channels of interstate commerce, and therefore does not fall within the first *Lopez* category. *See United States v. Kenney*, 91 F.3d 884, 889 (7th Cir. 1996) ("[A]lthough it may be true that Congress must regulate ... even mere possessions ... in aid of its prerogative of preventing the misuse of the channels of interstate commerce, the regulation still regulates much more than the channels of commerce. This rationale is therefore an aspect of Congress's broader power to regulate things 'affecting' interstate commerce.")

(24a-25a) (emphasis supplied)

Second, for the same reasons expressed in *Lopez*, amended § 2315(a) also cannot be sustained as a regulation of conduct substantially affecting interstate commerce. For like § 922(q), § 2315(a)

> is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.... Section [2315(a)] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 115 S. Ct. at 1630-31.

This case eloquently illustrates the problem with § 2315(a). Because (a) the statute does not criminalize attempted violations, and (b) the Chagall was seized before any sale or other disposition, there was no commercial aspect to this crime.[11] Rather, the proof, viewed in the light most favorable to the

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[11] Arguably, that part of the statute which prohibits the sale or bartering of stolen goods that have passed state lines might be authorized by the Commerce Clause. However, given the absence of an attempt provision in the statute, there was no basis in the evidence upon which the jury could have rationally concluded beyond a reasonable doubt that Trupin violated § 2315 in either of these ways.

government (and in the government's own words), established only

> that the Marc Chagall painting was stolen in or about April 1970 from Baltimore, Maryland, that in the summer of 1979 it was located on the defendant's boat which was docked at the 79th Street boat basin, that, several months later, in the beginning of 1980 defendant received the painting in Westport, Connecticut, and that the defendant brought it back to New York.

(A: 863)

In other words, Trupin stands convicted **solely** upon his possession (constructive or actual), concealment, storage, or disposal of property that was stolen 25 years ago, and last crossed a state line some 15 years ago. There can be no credible rationale for concluding that such conduct is "economic activity [which] substantially affects interstate commerce." *Lopez*, 115 S. Ct. at 1630.

Further, like § 922(q), § 2315(a) "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the [stolen property] possession in question affects interstate commerce." 115 S. Ct. at 1631. As Judge Coffee stated in *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996):

> Where Congress is not regulating economic activity, insisting on jurisdictional language in a federal criminal statute is essential because, "under our federal system, the 'States possess primary authority for defining and enforcing the criminal law....'" Jurisdictional

> language prevents federal authorities from usurping the power of state and local governments to make and enforce the criminal law, as they have in this case. "When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction....'" A jurisdictionalelement is therefore not mere surplusage, for it "ensure[s], through a case by case inquiry, that the [prohibited act] in question affects interstate commerce...."
>
> A statute without jurisdictional language permits a careless or overzealous federal prosecutor to bring the full weight of the national government to bear on a situation that may, in fact, lack any true connection with interstate commerce. By contrast, a properly framed statute that contains jurisdictional language requires the government's prosecutor to establish that the statute, as applied, is consistent with the federal government's authority under the Commerce Clause, and forces the prosecutor to establish a connection to interstate commerce beyond a reasonable doubt....

73 F.3d at 694 (citations and emphasis omitted).[12]

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[12] In *Wilson*, the Court, by a two to one majority, turned back a *Lopez* challenge to 18 U.S.C. § 248, the Freedom of Access to Clinic Entrances Act, based upon extensive Congressional findings (wholly absent in this case) that obstructing access to abortion clinics impacts upon interstate

(continued...)

The Second Circuit rebuffed this argument by concluding, in essence, that Congress' substitution of the "crossed State boundary" language for the "moving as interstate commerce" language worked a mere "technical" amendment that "did not greatly expand" § 2315's scope. (8a-11a) To the contrary, the 1986 amendment deleted the necessary jurisdictional element that ensures a case-by-case Commerce Clause inquiry. (A: 1364-65) Put simply, it is one thing for a statute to require an explicit connection between proscribed activity and interstate commerce. It is quite another where, as here, a statute only requires the government to prove that something crossed a state line sometime in the distant past. The "crossing a state line" requirement is obviously broader, and easily can be met in many situations – such as Trupin's – that do not implicate the Commerce Clause.

Indeed, the entire text of § 2315 demonstrates that merely crossing a state line does **not** in itself establish an impact upon or connection with interstate commerce. In contrast to § 2315(a)'s "crossing state lines" element, the other provisions of the statute, addressing counterfeit securities and tax stamps, require proof that those items are "moving as, or ... a part of, or ... constitute interstate or foreign commerce." This difference in wording, **found in the same statute**, conclusively proves that § 2315(a)'s language extends to conduct wholly unrelated to interstate commerce. *Cf. Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears") (citation omitted).

For example, merely carrying a piece of stolen property, owned for years by the same person, over a state line from one

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[12](...continued)
commerce. Judge Coffee's opinion was in dissent.

residence to another would meet § 2315(a)'s purported jurisdictional element, but obviously would not implicate the Commerce Clause. Thus, this purported jurisdictional element – crossing state lines – no more ensures case-by-case Commerce Clause analysis than do any of § 2315(a)'s other elements, such as knowing the property is stolen or possessing it.

It is this absence of an interstate commerce element that sets Trupin's case apart from the countless post-*Lopez* cases which have rejected Commerce Clause challenges to other statutes. *See, e.g., United States v. Sorrentino*, 72 F.3d 294, 296 (2d Cir. 1995) ("To obtain a conviction under Section 922(g), the government must show that the weapon at issue was 'ship[ped] or transport[ed] **in interstate or foreign commerce**' or was '**possess[ed] in or affect[ed] commerce**'") (emphasis supplied); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (same), *cert. denied*, 116 S. Ct. 1364 (1996); *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996) (Section 2251(a) requires knowledge that child pornography was or will be "transported **in interstate or foreign commerce** or mailed") (emphasis supplied), *cert. denied*, 117 S. Ct. 328 (1996); *United States v. Johnson*, 22 F.3d 106, 108-09 (6th Cir. 1994) (under "carjacking" statute, car in issue must have been "transported, shipped or received **in interstate or foreign commerce**") (emphasis supplied).

Concededly, courts also have rejected *Lopez* challenges to statutes with a similar lack of a specific interstate commerce element. However, there is a significant distinction between those statutes and § 2315(a): their legislative histories reveal specific Congressional fact finding. *See, e.g., United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996) ("Congress has made **specific findings** that local narcotics activity has a substantial effect on interstate commerce.") (collecting cases) (emphasis supplied); *United States v. Bishop*, 66 F.3d 569, 588 (3d Cir.)

(detailed legislative findings that "carjacking" was a national problem with a substantial impact on interstate commerce), *cert. denied,* 116 S. Ct. 681 (1995); *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996) (detailed legislative findings that nonpayment of interstate child support affected national economy), *cert. denied*, 117 S. Ct. 784 (1997).

By contrast, legislative findings with respect to § 2315(a)'s 1986 amendment – *i.e.*, Congress' decision to substitute the "crossing state lines" language for the "interstate commerce" language – "are [conspicuously] lacking here." *Lopez,* 115 S. Ct. at 1632. If anything, the Second Circuit's contention that only a "technical" change was intended by the 1986 amendment is belied by the remarks of the amendment's sponsor, Senator Thurmond, who expressly stated that the "in commerce" requirement was being removed because it had proven "unnecessarily burdensome." 131 Cong. Rec. 14184 (1985). Clearly, though, Congress does not have the authority to eliminate a jurisdictional element simply because it considers it burdensome.

In sum, then, this case is indistinguishable from *Lopez*. To be sure, the evidence, viewed in the light most favorable to the government, established Trupin's violation of New York Penal Law § 165.54 or § 165.52 (Criminal possession of stolen property in the first or second degree). However, this fact argues **against** the constitutionality of § 2315(a). As in *Lopez*:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down

> that road, giving great deference to congressional action.... The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated..., and that there never will be a distinction between what is truly national and what is truly local.... This we are unwilling to do.

115 S. Ct. at 1634 (citations omitted).

II. TRUPIN'S INDICTMENT SHOULD BE DISMISSED BECAUSE OF *EX POST FACTO* AND DUE PROCESS CONCERNS

The facts of this case are unusual in that there was a significant period of time during which Trupin could not have been prosecuted for his possession of the Chagall. Rather, it was the 1986 amendment to § 2315(a) that recriminalized such possession.

A. SYNOPSIS OF THE DEFENSE ARGUMENT

In essence, Trupin's claim on this POINT resolves into the following:

1. Under prior § 2315(a), mere possession of stolen property was not a crime.

2. The prior version of the statute did criminalize, *inter alia*, the receipt, concealment or storage of stolen property so long as the property was "moving as, or [was] a part of, or ... constitute[d] interstate or foreign commerce...."

3. The case law interpreting this statutory language established that, at some point, stolen property will "'come to rest' and los[e] its interstate character so that subsequent attempts to receive, conceal, sell or dispose of it will not violate 18 U.S.C. § 2315." *See, e.g.*, *Tobin*, 576 F.2d at 692.

4. The last proof as to the painting being transported over a state line was that Trupin brought it back to New York from Connecticut in early 1980. (T: 858)

5. Even assuming *arguendo* that Trupin's receipt of the painting in Connecticut and subsequent travel to New York affected interstate commerce,[13] the painting nonetheless "came to rest" more than five years before the November 10, 1986 amendment of § 2315.

6. Hence, on November 9, 1986, Trupin was not subject to prosecution for possessing, concealing or storing the painting. One day later, however, the situation changed dramatically with the enactment of amended § 2315(a). On that date, without **any** affirmative action by Trupin, his mere possession, storage or concealment of the painting became criminal.

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[13] This assumption is farfetched because Trupin's receipt of the painting was not a commercial transaction. Instead, it arose from his then-pending divorce proceedings. *See Lopez,* 115 S. Ct. at 1632 (Observing that Commerce Clause does not implicate divorce proceedings).

B. THE REASONS WHY THESE FACTS SHOULD HAVE BARRED PROSECUTION

United States v. Alkins, 925 F.2d 541 (2d Cir. 1991), demonstrates that amended § 2315(a) is an *ex post facto* law as applied to Trupin:

> The[ ] goals [of the *ex post facto* clause] would be jeopardized if Congress were able to criminalize conduct after it had occurred simply by making criminality turn on a jurisdictional fact that is bound to occur after enactment and is the unpreventable consequence of conduct by the defendant before enactment. The application of such a statute to impose criminal penalties on an individual whose conduct was not criminal when performed would violate the *ex post facto* clause.

925 F.2d at 549.

This language is directly applicable to Trupin because, on the day before the enactment of the amended statute, his possession, storage or concealment of the painting was not criminal.

In rejecting this argument, the Second Circuit, relying upon the prohibition case of *Samuels v. McCurdy*, 267 U.S. 188 (1925), hypothesized an unspecified "grace period" after § 2315(a)'s amendment in which Trupin "could have returned the painting to its owners anonymously or through his attorney, or delivered it to a legitimate custodian of lost and stolen art. His failure to take any such remedial steps after the change in the

federal law subjects him to conviction without implicating the *ex post facto* clause." (17a-18a)

Prohibition, however, was a hotly debated and highly publicized issue which required a constitutional amendment that had to be ratified by the several states before it became the law of the land. Moreover, the Eighteenth Amendment, by its own terms, only became effective a year **after** its ratification! The *Samuels* Court was constitutionally justified, therefore, in permitting the defendant's prosecution for continuing to possess liquor bought before the advent of prohibition because the defendant had a legal "out" – he could have disposed of his liquor at any time during the year-long grace period between ratification and the law's effective date. On the other hand, Trupin lacked any such legal "out." He received **no** warning or grace period. One day his conduct was legal, the next it was not. Put simply, then, Trupin faced prosecution from the moment the 1986 amendment was enacted. It is for these very reasons that his conviction raises not only *ex post facto* concerns, but also fundamental fairness/due process concerns.

To this end, we respectfully note that the various "outs" proposed by the Second Circuit, while superficially appealing, evince a basic misapprehension of the Fifth Amendment. For Trupin could have utilized those "outs" only if he (a) actually learned of the statute's amendment before or at the very moment of enactment, and (b) decided then and there, for example, to return the painting to its rightful owners. Otherwise, continuing to possess, conceal or store the painting between the enactment of the amendment and the decision to return it still would have subjected Trupin to punishment under the amended statute.

Put another way, adhering to the Court of Appeals' suggested approach would have compelled Trupin to incriminate himself by returning the painting to its owner. Yet, "'[r]ecent re-

examination of the history and meaning of the Fifth Amendment has emphasized anew,'" *United States v. Castellano*, 610 F. Supp. 1137 (S.D.N.Y. 1985) (quoting *Grunewald v. United States*, 353 U.S. 391 (1957)), "that a person should **not** be compelled to give information which might **tend** to show he himself has committed a crime." *United States v. Kuh*, 541 F.2d 672, 677 (7th Cir. 1976) (emphasis supplied). Moreover:

> The privilege guaranteed by the Fifth Amendment not only extends to statements that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the individual for a crime, provided such individual has reasonable cause to fear he might thereby be convicted of that crime....

United States v. King, 402 F.2d 694, 697 (9th Cir. 1968).

Admittedly, and as the Second Circuit recognized, these cases are not directly on point. (18a-19a) Nonetheless, they are persuasive. Once § 2315(a) was amended, the mere fact of Trupin's continued possession, concealment or storage of the painting subjected him to criminal liability. Nor could he have simply disposed of the painting, as that would have independently violated the statute. His only real option was to return the painting to its rightful owners. Yet, to do so would have resulted in self-incrimination. In view of this Hobson's Choice, Trupin's prosecution was fundamentally unfair, and his indictment must be dismissed.

III. DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE OF TWO KEY ERRORS IN THE DISTRICT COURT'S JURY INSTRUCTIONS

At a minimum, a new trial is mandated due to two crucial errors in the Trial Court's charge to the jury. **First**, even if § 2315(a)'s "crossing state lines" requirement provides the necessary jurisdictional element ensuring through "case-by-case inquiry [] that the [prohibited conduct] affects interstate commerce," *Lopez*, 115 S. Ct. at 1631, the jury was permitted to convict Trupin without finding **any** such connection to interstate commerce. **Second**, the jury was wrongly allowed to convict without agreeing on the means by which Trupin violated § 2315(a).

A. THE TRIAL COURT'S INSTRUCTIONS PERMITTED THE JURY TO CONVICT WITHOUT FINDING ANY IMPACT ON INTERSTATE COMMERCE

In rejecting Trupin's *Lopez* challenge to § 2315(a), the Second Circuit reasoned that the statute's requirement that the stolen property crossed a state line is, in essence, equivalent to an express jurisdictional requirement that the property affected interstate commerce. For the reasons stated in POINT I, we of course dispute this contention. But even assuming its accuracy, the Second Circuit's interpretation of the statute could only pass Commerce Clause muster to the extent that the defendant's conduct with respect to the stolen property is commercial in nature. That is, if a defendant engages in commercial activity with respect to stolen property that once crossed a state line, one could conclude that such conduct creates an adequate nexus to interstate commerce. Such a construction of the statute – requiring commercial activity – would avoid the pitfalls of

family transfers or gifts years after the property had crossed a state line. *Cf. United States v. Denalli*, 73 F.3d 328 (11th Cir.), *amended in part on reh'g*, 90 F.3d 444 (1996); *United States v.Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (Both holding that, after *Lopez*, the federal arson statute requires proof that destruction of a private residence had a substantial impact on interstate commerce).

Here, though, the Trial Court told the jury that Trupin's conduct did **not** need any commercial aspect: "The government does not have to show that the defendant gained any personal benefit.... **For example, a defendant may have 'disposed' of the property by abandoning it."** (T: 1226) (emphasis supplied) Similarly, the Trial Court instructed the jury that it could convict upon proof that Trupin merely had "physical custody" of the painting. (T: 1227)

In other words, the Trial Court told the jury that wholly private, noncommercial activity is criminal under § 2315(a) so long as the stolen property in question crossed a state line sometime in the past. Because it allowed the jury to convict on facts that would have compelled the Trial Court to acquit Trupin on Commerce Clause grounds, this instruction was plainly erroneous.

In dismissing this claim, the Second Circuit noted that it had upheld a similar instruction in *Sirois*. *Sirois*, however, is distinguishable in at least two critical respects.

First, as discussed above, the child pornography statute at issue there (18 U.S.C. § 2251(a)), unlike § 2315, contains an express jurisdictional requirement that the minor be transported in interstate commerce. Accordingly, the government was still held to its proof that Sirois' conduct affected interstate commerce, despite the charge that the jury did not have to find

that the pornographic pictures were "commercial activity." Here, by contrast, the district court's instruction that Trupin's conduct did not need any commercial aspect invited a conviction in the absence of a finding that his activities were commercial in nature.

Second, the instruction in *Sirois* stemmed from the fact that Congress had specifically deleted the statutory requirement of proof that the pornographers had acted with a "commercial purpose." Of course, there was no such explicit excision in the case of § 2315.

B. THE TRIAL COURT'S CHARGE ABRIDGED DEFENDANT'S RIGHT TO A UNANIMOUS VERDICT

Over defense objection (T: 1117-18, 1208), the District Court instructed the jury that it need only be unanimous as to groups of ways in which § 2315(a) could be violated. That is, the jury was told that it need only find unanimously "that the defendant possessed, concealed or stored the property or that the defendant bartered, sold or disposed of the property." (T: 1229)

This charge was erroneous for two reasons. **First**, jury instructions grouping together several means of violating a statute are only permissible where the means within each group are not "conceptually distinct." *United States v. Gipson*, 553 F.2d 453, 458 (5th Cir. 1977) (cited with approval, *United States v. Schiff*, 801 F.2d 108, 114-15 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987)). Here, the concept of possession is conceptually distinct from that of concealing or storing; arguably, one could store or conceal property without disposing of it but, in the process, cede "substantial control" over the property. (*See* T: 1227) (Trial Court's jury instruction defining "constructive possession"). Accordingly, the Trial Court's

charge infringed Trupin's right to a unanimous verdict as to the factual basis for his conviction. *See United States v. Peterson*, 768 F.2d 64, 66-67 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985).

Second, even if the Trial Court's grouping did not run afoul of the "conceptually distinct" rule, it was still barred by *Schiff* – an argument that the Second Circuit completely failed to address. In *Schiff*, the Court held that where a district court permits a jury to consider conceptual groupings of means to violate a statute, "[a] conviction ... will stand [only] if there was sufficient evidence with respect to each 'specification' in the challenged count of the indictment." 801 F.2d at 115.

Here, within the grouping of "sold, bartered or disposed of," there was a failure of proof with respect to at least two of the three possibilities. That is, the jury had no rational basis for concluding that Trupin bartered or sold the painting because the FBI intervened before either of these events could have occurred.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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